STATE OF MICHIGAN

COURT OF APPEALS

GARY HALLIBURTON,

Petitioner-Appellant-Cross-Appellee,

v

RIVER ROUGE SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent-Appellee-Cross-Appellant.

UNPUBLISHED
February 11, 2014

No. 312561
State Tenure Commission
LC No. 11-001649

Before: BOONSTRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Petitioner appeals by leave granted, and respondent cross-appeals, from the final decision and order of the State Tenure Commission (Commission) discharging him from employment. For the reasons set forth in this opinion, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Petitioner began working for respondent during the 1996-1997 school year, and obtained tenure in 2000. Petitioner taught American History and World History at River Rouge New Tech High International Academy at the time of the events underlying this case.

At the start of the 2011-2012 school year, a parent complained that petitioner had made offensive remarks in her daughter's history class. It was alleged that petitioner had used racial slurs and accused his class of acting "niggerish." An investigation ensued. On November 9 2011, Carlos Lopez, respondent's superintendent of schools, and Nick Edwards, the director of the Academy, filed written tenure charges against petitioner with respondent's board of education (Board). See MCL 38.102. The written charges alleged that petitioner had engaged in inappropriate and unprofessional conduct while acting in his capacity as a teacher, including:

> a. Directing prejudiced, bigoted, and/or racially charged statements at students;

b. Making inappropriate and unwanted statements, including sexual innuendos, to an employee of City Year[1] assigned to work in the School District, some of which occurred in front of and within earshot of students;

c. Referring to students as "hopeless," "lost causes," and/or other terms disparaging students and/or their learning and career potential to fellow staff members, contracted workers, and/or volunteers. Some of these statements being in front of or within earshot of students.

The charges further alleged that "the foregoing has occurred notwithstanding that Mr. Halliburton has been warned and disciplined in the past for using inappropriate language and/or making inappropriate comments, including a prior written reprimand, a one-day suspension without pay, and a three-day suspension without pay." Additionally, the charges alleged that "the conduct of Gary Halliburton, as set forth herein, has produced an actual and a presumptive adverse impact upon students, and the school community at large."

Lopez and Edwards requested that the Board proceed upon the written tenure charges, which called for petitioner's discharge from employment, in accordance with the Teachers' Tenure Act (the Act), MCL 38.71 *et seq*. On November 16, 2011, following a closed meeting attended by petitioner and his union representative and during which the union representative addressed the Board, the Board voted unanimously to proceed on the tenure charges and to discharge petitioner. On November 17, 2011, the Board sent a letter to petitioner advising him of the Board's decision to "proceed upon the enclosed charges." A copy of the Board's decision, by resolution, was also enclosed.

On December 7, 2011, petitioner filed a claim of appeal with the Commission. On December 14, 2011, respondent filed a motion for a more definite statement of the claim of appeal with the Commission. On December 16, appellant filed a motion for a more definite statement of the charges with the Commission. On January 3, 2012, respondent filed a bill of particulars regarding the factual allegations pertaining to the charges.[2] Petitioner filed an

[1]City Year is a non-profit organization that places volunteers, mentors, and tutors into schools.

[2] The Bill of Particulars identified the following factual allegations:

1. The incident referenced in Charge 4(a) occurred in late September or early October of 2011 during Appellant's first hour class. In that class, Appellant directed a statement at the students in his class to the effect of "you are acting niggerish." This was heard and witnessed by numerous students in that first hour class. This specific incident was also discussed with Appellant in a meeting with Charging Party Edwards on October 10, 2011.

2. The incident(s) in Charge 4(b) relate(s) to unwanted sexual advances made by Appellant to a member of City Year named Cynthia Weaver. These advances occurred on two occasions. The first was on or about 2:15 p.m., October 20, 2011, in Appellant's classroom. The second was on or about 9:30

amended claim of appeal on January 24, 2012, and a second amended claim of appeal on February 10, 2012.

A hearing was conducted before an administrative law judge (ALJ) in late February 2012. The ALJ issued his preliminary decision and order (PDO) on June 8, 2012. The ALJ first addressed the proper statutory standard for reviewing respondent's decision to discharge petitioner. This issue arose because the Act had been amended by way of 2011 PA 100, effective July 19, 2011, and the amendment had changed the applicable standard. Prior to July 19, 2011, MCL 38.101(1) had stated in relevant part: "Except as otherwise provided in section 1a of this article, discharge or demotion of a teacher on continuing tenure may be made only for *reasonable and just cause* and only as provided in this act." (Emphasis added). The 2011 amendment modified the language of MCL 38.101(1), which now states, "Except as otherwise provided in section 1a of this article, discharge or demotion of a teacher on continuing tenure may be made only for *a reason that is not arbitrary or capricious* and only as provided in this act." (Emphasis added).

Petitioner had argued that because petitioner had obtained tenure before the 2011 amendment of the Act, he had a vested property right to application of the "reasonable and just cause" standard of the former MCL 38.101(1). In contrast, respondent had asserted that the standard for discharge established by the Commission that was in place prior to July 19, 2011, is not relevant in this matter.

The ALJ first addressed the proper statutory standard for reviewing respondent's decision to discharge petitioner. Relying on the Commission's prior determination that a teacher did not have a vested right to a particular statutory standard until the accrual of the teacher's cause of action, the ALJ determined that the "not arbitrary or capricious" standard of MCL 38.101(1), as amended, applied because the tenure charges had been brought after the amendment took effect.

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a.m., October 25, 2011, in a corridor on the second floor of River Rouge New Tech High International Academy. In these instances, Appellant proposed to take Ms. Weaver out for an alcoholic beverage, told her that she was attractive, made comments to the effect of "wanting to see her outside her City Year uniform," and generally made her uncomfortable with his demeanor, proximity to her, and his tone. The first of these incidents was also witnessed by City Year member Alex Paris and possibly others that Appellee has yet to determine.

3. The incident(s) referenced in Charge 4(c) happened on numerous and frequent occasions and are aptly described in the charges. They were witnessed by City Year member Alex Paris and students in Appellant's class(es).

4. As for the adverse impact of Appellant's actions, Appellee submits that the intimidating, hostile, demeaning, or degrading environment created by Appellant for his students, the members of City Year, and others through his words and actions constitute both actual and presumptive adverse impact.

The ALJ also rejected petitioner's assertion that respondent had failed to comply with the due process requirements of the Act. The ALJ found that petitioner was accorded due process when he was given a copy of the charges in advance of the controlling Board's action on the charges, and an opportunity to appear before the controlling Board prior to its decision.

To determine the appropriate level of discipline, the ALJ considered each of the written tenure charges. The ALJ determined that respondent proved the charges by a preponderance of the evidence. With regard to charge a, he found the testimony of three student witnesses to be credible and that their testimony that petitioner told students that they were "acting Negroish," "acting niggerish," or acting like "niggers" when the class became rowdy established that petitioner directed prejudiced, bigoted, and/or racially charged statements at students and that he used the terms to demean and insult the students. He found that petitioner's conduct was "clearly offensive to students, obviously inappropriate and is unacceptable conduct for a teacher." The ALJ additionally noted that petitioner had been previously disciplined for calling a student "a stupid nigger or ignorant nigger," for violating a directive to refrain from making derogatory statements to students when he called a student a "little high yellow somethin'." He found that petitioner's conduct, coupled with his prior discipline for similar conduct, warranted his discharge.

With regard to charge b, the ALJ found the testimony of Cindy Weaver to be credible and that her testimony established that petitioner made inappropriate and unwanted statements, including sexual innuendos, in front of and within earshot of students. The ALJ specifically found that petitioner's comment to Weaver that "he couldn't wait to see what she looked like outside of [her] uniform" was an indication that he wanted to see her naked. The ALJ determined that the statement was clearly an inappropriate statement to make to a volunteer and warranted discipline.

With regard to charge c, the ALJ found that the testimony established that petitioner referred to students as "hopeless," "lost causes," and/or other terms disparaging students and/or their learning and career potential to fellow staff members, contracted workers, and/or volunteers. The ALJ determined that:

> In addition to using degrading racial references to students in Charge a, [petitioner] repeatedly degraded students by referring to them as "ignorant" or "lost causes." [Petitioner] degraded his students in front of City Year volunteers, to a parent/guardian at parent-teacher conferences, the parent/guardian could not help but to believe that the school district was not doing its utmost to educate all the students in the district. As to statements to City Year volunteers, the volunteers could only conclude that [petitioner] did not believe that their efforts to assist in the education of River Rouge students was worthy of their efforts. As to statements heard by students, the students could only feel betrayed by their teacher. [Petitioner's] statements had no educational purpose. The statements were made for no purpose other than to demean students. The students that heard the statements felt like [petitioner] was not trying to teach them anything.
>
> Moreover, as it relates to statements overheard by students, [petitioner] was specifically directed not to make disparaging remarks to students.

> [Petitioner's] reference to students as a "lost cause" is a violation of this directive. [Petitioners] statements, as alleged in charge c, warrant discipline.

The ALJ concluded:

> [Petitioner] claims that his service to students at River Rouge would assist students to overcome the disadvantages facing them. His conduct and attitude toward students, however, as shown by the evidence, do not support this claim. On the contrary, the district has shown by a preponderance of the evidence that [petitioner] engaged in unprofessional and inappropriate conduct, that he is unfit to teach and that his discharge is not arbitrary or capricious.

Petitioner filed exceptions, and respondent filed cross-exceptions responding to petitioner's exceptions to the ALJ's PDO. On September 7, 2012, the Commission issued its final decision and order.

Petitioner filed 25 exceptions. The Commission noted that petitioner set forth five arguments, and discussed each exception as it related to one of those five arguments. The Commission addressed petitioner's first exception in which petitioner argued that the ALJ had improperly applied the amended "arbitrary or capricious" standard of MCL 38.101(1). The Commission denied this exception, concluding that the amended standard applied in this case because the written tenure charges were not filed until after the statutory amendment took effect.

Petitioner's second argument, which encompassed exceptions 12 and 24, asserted that the ALJ erred in finding that respondent complied with the due process requirements of the Act. The Commission denied these exceptions and concluded that the ALJ had not erred by finding that due process is satisfied when a teacher receives a copy of the charges when they are filed with the controlling board and an opportunity to respond to the charges before the board's action on them. MCL 38.102. The Commission noted that it was undisputed that a copy of the charges was mailed to petitioner on November 9, 2011. The letter accompanying the charges informed petitioner that the controlling board would consider the charges at its November 16, 2011, meeting, and that petitioner could address the board prior to its decision. On that date, petitioner was given an opportunity to address the board in closed session prior to its vote on the charges and could have raised his concern regarding the adequacy of the charges at or before the meeting. The Commission concluded that this procedure comported with the requirements of due process.

Petitioner's third argument encompassed 17 exceptions related to respondent's burden of proof and the ALJ's finding that the witnesses were credible (exception 7) and that their testimony supported a finding that petitioner made racially derogatory statements to students (exceptions 2, 3, 4, 11, 16, 17, and 22) and that petitioner described students as "hopeless," "lost causes," or other disparaging terms (exceptions 8, 9, 10, 20, and 21). The Commission determined that the evidence supported the ALJ's factual findings that petitioner made the challenged remarks both to volunteers and to or in the presence of students, and that the only purpose of the statements was to demean students. The Commission denied each of the exceptions. The Commission granted petitioner's exceptions 5, 6, and 19, which related to petitioner's alleged comments about Weaver's uniform, finding that in the context of petitioner's

statements about the uniform, "we cannot say that it is more likely than not that the statement had an inappropriate sexual intent rather than merely an intent to see Ms. Weaver outside the school setting." With regard to exception 23, in which petitioner challenged the ALJ's finding that petitioner showed by a preponderance of the evidence that he engaged in unprofessional and inappropriate conduct, the Commission denied the exception on the ground that "All of the arguments raised in support of this exception are raised in support of other exceptions and are adequately addressed elsewhere in this decision."

Petitioner's fourth argument encompassed exceptions 15, 18, and 25, and involves the ALJ's determination that discharge is an appropriate remedy in this case. The Commission denied exception 15, in which petitioner argued that the ALJ erred in finding that adverse effect was presumed as a result of his derogatory comments, on the ground that adverse effect is presumed where it is found that petitioner engaged in obviously inappropriate conduct at school that involved students. The Commission denied exception 18, which involved the ALJ's consideration of petitioner's prior disciplinary history, on the ground that the prior disciplinary action involved conduct that was substantially similar to the conduct involved in the present action and that the ALJ properly considered disciplinary history in the determination of the appropriate level of discipline for professional misconduct. The Commission also found that even without consideration of prior misconduct, discharge in this case would be not arbitrary or capricious. The Commission also denied exception 25, finding that the evidence of petitioner's contributions to the school community did not outweigh or mitigate the adverse effect and seriousness of his proven misconduct. The Commission noted that this case "does not, for example involve an aberration in an otherwise unblemished teaching career."

Petitioner's final argument encompassed exceptions 13 and 14 and concerned petitioner's argument that imposing further discipline for conduct for which petitioner had already been disciplined by being directed to apologize for telling his class they "acted Negroish" subjected him to double jeopardy. The Commission denied these exceptions, finding that the discipline under consideration is not precluded based on prior disciplinary action. The Commission opined:

> The record supports a finding that the October 2011 meetings were the beginning of the investigation about appellant's use of racially offensive language. Mr. Edwards' directive that appellant apologize to SL's mother and to his class was clearly not the end of the matter in the minds of district officials.
>
> In addition, it is significant that the district's investigation disclosed other instances of racially derogatory comments by appellant to students. Based on review of the entire record, we find that, even if evidence of the comments reports by SL were excluded, there was sufficient evidence to establish charge (a).

In the end, the Commission concluded that respondent had proven the allegations contained in the tenure charge by a preponderance of the evidence and that respondent's stated reasons for discharging petitioner were neither arbitrary nor capricious. In its final decision and order, the Commission granted in part and denied in part petitioner's exceptions, and ordered petitioner's discharge.

II. STANDARDS OF REVIEW

This Court must uphold a decision of the Commission if it is authorized by law and is supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Beebee v Haslett Pub Schools*, 406 Mich 224, 231; 278 NW2d 37 (1979). Review of an agency decision "must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views." *Vanzandt v State Employees Retirement Sys*, 266 Mich App 579, 588-589; 701 NW2d 214 (2005) (quotation omitted). "An agency's findings of fact are afforded deference, particularly with regard to witness credibility and evidentiary questions." *Id.*

III. APPLICABLE STATUTORY STANDARD

Petitioner argues that because he acquired tenure before MCL 38.101(1) was amended, he had a vested right to have the "reasonable and just caused" standard of the former MCL 38.101(1) applied. As noted previously, MCL 38.101(1) was amended, effective July 19, 2011. See 2011 PA 100. Prior to July 19, 2011, MCL 38.101(1) had prescribed a "reasonable and just cause" standard. The 2011 amendment modified MCL 38.101(1), which now prescribes a "not arbitrary or capricious" standard.

Petitioner's argument was raised and rejected in *Cona v Avondale School Dist*, 302 Mich App 123; ___ NW2d ___ (2013). In *Cona*, this court opined:

> Whereas the retroactive application of a law is improper when it would take away or impair a vested right acquired under an existing standard, *Morgan v Taylor School Dist*, 187 Mich App 5, 9-10; 466 NW2d 322 (1991), petitioner cannot demonstrate the existence of any such vested right in this case. "It is the general rule that that which the legislature gives it may take away. A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it." *Lahti v Fosterling*, 357 Mich 578, 589; 99 NW2d 490 (1959). Until the tenure charges against petitioner were actually filed, petitioner had no more than a mere expectancy that any particular statutory standard would be applied to his conduct. See *Morgan*, 187 Mich App at 12; see also *Detroit v Walker*, 445 Mich 682, 700; 520 NW2d 135 (1994). The Commission properly applied the amended "not arbitrary or capricious standard of MCL 38.101(1) in this case.

III. DUE PROCESS

Petitioner argues that the Commission erred by rejecting his claim that he was deprived of his property interest in employment without due process of law, contrary to Const 1963, art I, § 17. Plaintiff claims that the charges provided no information regarding the identity of the complaining witnesses and that the charges did not detail to whom the "hopeless/lost cause" statements were allegedly made and, therefore, he had no opportunity to adequately respond to this aspect of the charges before they were filed with the Board.

The principle that a public employee is entitled to due process prior to termination of his employment is rooted in the United States Supreme Court's decision in *Cleveland Bd of Ed v Loudermill*, 470 US 532; 105 S Ct 1487; 84 L Ed 2d 494 (1985). In *Loudermill*, the Supreme court concluded that "all the process that is due is provided by a pretermination opportunity to respond, couples with post-termination administrative procedures as provided by the Ohio statute." *Id.* at 547-548. Our Supreme Court has noted that under cases following *Loudermill*, "due process is satisfied if a discharged employee was given an opportunity to respond before termination, and posttermination procedures are available." *Tomiak v Hamtramck School Dist*, 426 Mich 678, 701; 397 NW2d 770 (1986).

There is no dispute that petitioner was given a copy of charges and an opportunity to respond to those charges before the Board voted to proceed upon those charge. School district administrators filed charges with the Board on November 9, 2011. That same day, the district provided a copy of those charges to petitioner, along with a notice. The Board held a public meeting on November 16, 2011 to consider the charges against petitioner. At petitioner's request, the Board went into closed session to consider the charges before a vote on whether to proceed upon those charges. Petitioner's union representative addressed the Board regarding the charges before the board proceeded upon the charges. Respondent clearly was provided due process in that he received notice of the charges and an opportunity to respond. As the Commission noted, if petitioner was dissatisfied with the adequacy of the charges, he could have raised that concern with the Board at or before the November 16 meeting.

IV. EVIDENCE

Petitioner argues in the alternative that the Commission's decision that respondent's reasons to discharge appellant were not arbitrary or capricious was not based on competent, material, and substantial evidence on the whole record. Substantial evidence is that which a reasonable mind would accept as adequate to support a decision; it is more than a scintilla but may be substantially less than a preponderance. *Parker v Byron Center Pub Schools Bd of Ed*, 229 Mich App 565, 578; 582 NW2d 859 (1998). A review of his arguments reveals that his arguments are primarily based on witness credibility. However, witness credibility is left to the deference of the finder of fact. *Vanzandt*, 266 Mich App at 588-589. Inconsistencies in the students' testimony regarding whether petitioner called his students' behavior negroish or niggerish, or whether petitioner used the word nigger,[3] do not undermine the Commission's decision where it was clear that petitioner accused his students of acting like negros. There was competent, material, and substantial evidence that petitioner used the term in a racially derogatory manner. Three students testified that petitioner referred to his class as "niggerish," "niggers," or "negroish." Petitioner does not deny calling his class "negroes." Although petitioner offered an explanation for his use of the term, the testimony of the students supports a finding that petitioner used the term in a racially derogatory manner when he was angry at the class for misbehaving. Similarly, there was competent, material, and substantial evidence that petitioner described his students as "hopeless" and "lost causes." Two City Year volunteers

[3] Petitioner does not deny using the term "negro."

testified that petitioner used such terms and made the statements in front of students. Student testimony that petitioner called students "ignorant," and that he told students that they "would not make it in life," was presented. Finally, there was competent, material, and substantial evidence that petitioner's statements had an adverse effect on his students and the community at large. Petitioner takes issue with the Commission's finding that adverse effect is presumed where petitioner engaged in "obviously inappropriate conduct at school that involved students." However, even without the presumption, the evidence supports the Commission's determination. One student testified that petitioner's statements made her feel "below" and "belittled." Another student testified that the statements caused him to feel as if he were being "put down" and that petitioner "wasn't really trying to teach us anything." Another student testified that the statements made him feel "mad and sad" and as if petitioner was not treating him and the class with respect.

V. CROSS-APPEAL

On cross-appeal, respondent argues that the Commission acted contrary to law when it discussed prior precedent that positive contributions of the teacher to the school community could mitigate misconduct sufficient for discharge under the amended arbitrary and capricious standard.

Petitioner alleged in one of his exceptions that the ALJ did not properly consider the positive contributions he made to the school community and that his contributions weighed against his discharge. Petitioner relied on the Commission decisions in *Grindstaff v Lakeshore Pub Schools*, (STC 83-59) (1985) and *Gallant v Bd of Ed of Kalamazoo Pub Schools*, (STC 06-19) (2007). Respondent maintained that the holding of *Grindstaff* and its progeny should no longer apply to cases before the Commission because the Act was amended to change the standard by which tenured teachers could be discharged. Respondent argued that the holding from *Grindstaff* that good service can stand to mitigate discipline is not consistent with the not arbitrary or capricious standard. Respondent argued in the alternative that even if the Commission determined that *Grindstaff* was applicable under the amended standard, the facts of the present case did not justify mitigation. The Commission's discussion of the role of a teacher's positive contributions in determining whether or not the Board's decision to discipline a teacher was arbitrary or capricious was as follows:

> The determination of the appropriate level of discipline for charges that are proved by a preponderance of the evidence has long involved the consideration of many factors, including the teacher's contributions to the school community. See, e.g., *Zangkas v Birmingham Public Schools Board of Education* (06-03). We disagree with the appellee's blanket assertion that a teacher's contributions are irrelevant to the determination of whether a controlling board's decision to discipline a tenured teacher is based on a reason that is arbitrary or capricious. Nonetheless, based on all relevant factors, we find that evidence of appellant's contributions to the school community does not outweigh or mitigate the adverse effect and seriousness of his proven misconduct.

The Commission did not address the merits of respondent's legal argument. Rather, the Commission noted that it disagreed with respondent's blanket assertion but that even if the

precedent applied, petitioner's contributions to the school community did not outweigh or mitigate the adverse effect and seriousness of his proven misconduct. Under these circumstances, where the Commission did not consider the issue and agreed with respondent with regard to its alternative argument, the Commission's fleeting statement that it "disagree[s] with the appellee's blanket assertion that a teacher's contributions are irrelevant to the determination of whether a controlling board's decision to discipline a tenured teacher is based on a reason that is arbitrary or capricious" is dicta. Further, because the Commission granted petitioner's discharge, which is the relief respondent was seeking, there is no remedy that we can fashion and the issue is moot. Although moot issues may be addressed by this Court if they "involve [questions] of public significance and are likely to recur, yet evade judicial review, we do not believe the question at hand is likely to evade judicial review. *People v Kaczmarek*, 464 Mich 478, 481; 628 NW2d 484 (2001).

Affirmed.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald